IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 158 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RABARI KHETABHAI PABABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 158 of 1991

MR DK ACHARYA for Petitioner No. 1

MR MA BUKHARI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/01/2002

CAV JUDGEMENT

#. This is an appeal against the judgement and conviction order dated 31.1.1991 recorded by the learned

Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.168 of 1990 in which the learned Additional Sessions Judge convicted the present appellant for the offence punishable under section 304, Part II of IPC and sentenced him to suffer RI for 5 years. The appellant was further directed to pay a fine of Rs.300/-. He was also directed to undergo RI for two months in case he did not pay the fine.

#. The facts of the case of the prosecution against the present appellant may be briefly stated as follows.:

#. On 9.5.1990 at about 1.00 p.m. deceased Ratnabhai Karamsibhai was taking his food under a neem tree near a water tank at village Santalpur in Banaskantha District. His cattle were sitting under the neem tree by the side of him. At that point of time, the present appellant and his two brothers - Rabari Vashrambhai Pababhai and Rabari Velabhai Pababhai arrived there with sticks in their hands. They asked the deceased Ratnabhai Karamsibhai to remove his cattle from the said place so that the appellant and his brothers could allow their cattle to sit there. At that time, the deceased refused to obey the said directions of the appellant and his two brothers. Therefore, the appellant dealt stick blow on the head of the deceased. Thereafter, other two brothers also dealt stick blow on the deceased. Same-way, the father of the deceased was also present there at that time. A stick blow was dealt on his person also. Even the brother of the deceased who was present there also sustained injuries at the hands of the aforesaid accused persons. Thereafter, informant raised shout. The appellant and his brothers ran away from the said spot. The deceased had head injury and had fallen on the ground. His injury was bleeding. Thereafter, a motor vehicle was engaged and the deceased was taken to Santalpur hospital. However, a doctor was not available at the said place, and therefore, the deceased was taken to Radhanpur hospital. Sister of the deceased namely Naviben Karamsibhai lodged the FIR at about 7.30 p.m. at Radhanpur police station.

#. The offence was registered at "0" number, since the offence fell within the territorial jurisdiction of Varahi Police Station. The FIR was transferred to Varahi police station and it was registered there. After the registration of the offence at Varahi police station, the Investigating Officer undertook the investigation. The panchnama of the scene of the offence was drawn. The muddamal articles were recovered. The appellant and two other accused persons were arrested. The statements of

the witnesses were recorded. The dead-body of the deceased was sent for post-mortem and appropriate reports were collected. At the conclusion of the investigation, chargesheet was filed against the present appellant and his two brothers for the offence punishable under sections 302, 323 read with section 34 of IPC as well as for the offence punishable under section 37(1) read with section 135 of the Bombay Police Act for carrying weapons in contravention of the notification of the District Magistrate of Banaskantha District.

#. Since the offence punishable under section 302 of IPC was exclusively triable by the court of Sessions, the learned Magistrate committed the case against the appellant and two other accused persons to the court of Sessions.

#. The learned Additional Sessions Judge in charge of the case, supplied the copies of the police investigation papers to the appellant and two other accused persons, charge was prepared and framed at Exh.4 for the aforesaid offences. It was read over and explained to all the three accused persons, they pleaded no guilty to the said charge, and therefore, the learned Additional Sessions Judge proceeded to record the evidence against the appellant and two other accused persons. At the close of the evidence, further statements of the accused persons were recorded under section 313 of the Code of Criminal Procedure, 1973. The three accused persons pleaded not guilty and contended that, false case was filed against them. The arguments were heard and at the end of the trial, the learned Additional Sessions Judge found that the present appellant could not be convicted for the offence punishable under section 302 of IPC. However, the learned trial Judge found the appellant guilty for the offence punishable under section 304, Part II of IPC and punished him as aforesaid after hearing the appellant and other accused persons on the quantum of punishment.

#. Two other accused persons were also sentenced to suffer SI for one month and were directed to pay a fine of Rs.200/- and in default of payment of fine, they were required to undergo further SI for one month for the offence punishable under section 323 of IPC. They were, however, not convicted for the offence punishable under section 302 read with section 34 of IPC.

#. Feeling aggrieved by the aforesaid judgment and conviction order of the learned Additional Sessions Judge, the present appellant - accused No.1 preferred this Criminal Appeal before this Court. The main

contentions of the appellant before this Court are that the learned Additional Sessions Judge has committed serious error in appreciating the evidence. That entire story against the appellant has been fabricated. That there was no person present at the time when the deceased sustained injuries, and therefore, false FIR has been filed naming the appellant as the person who had dealt stick blow on the person of the deceased. That even the local situation shows that there was a slope and the blood was found almost at the top of the slope which is at the distance of about 57 feet from the place where the tree is situated under which the deceased was allegedly taking his food at the time of commission of the offence. That it is highly improbable that the deceased could have climbed the distance of 57 feet after receiving the injuries. That therefore entire episode as suggested by the prosecution witnesses is improbable indicating that the prosecution witnesses were not the eye witnesses. It is also contended that, except the evidence of interested witnesses, there is no independent witness corroborating their evidence, and therefore, the trial Court ought to have rejected their evidence. That on the whole, the judgment and conviction order of the learned Additional Sessions Judge are illegal and erroneous and deserve to be set aside. It is, therefore, prayed that the present appeal be allowed, the judgment and conviction order against the appellant be set aside, the appellant be acquitted of the charges levelled against him and he may be set at liberty forthwith directing the cancellation of bail bond presented by him.

#. The appeal was admitted and the appellant was released on bail by an order dated 20.3.1991. Therefore, the appellant is on bail at present pending hearing and disposal of the appeal.

##. At the hearing, Mr.D.K.Acharya, learned advocate argued the matter on behalf of the appellant. On the other-hand, the State was represented by Mr.M.A.Bukhari, learned Additional Public Prosecutor. They have argued the matter at length and they have also taken me through the oral and documentary evidence as well as findings and reasonings recorded in the judgment by the learned trial Judge.

##. Two other brothers of the present appellant who were also accused before the trial Court in Sessions Case No.168 of 1990 and who were also convicted by the learned Additional Sessions Judge as above, have not preferred an appeal and they have undergone their sentence and have paid their fine as per the statement made by the learned

advocate for the appellant. Therefore, we are required to deal with the present appeal involving the present appellant who has been sentenced as above.

##. In order to prove the case against the present appellant, the prosecution has examined the following witnesses before the trial Court.

(i) PW-1 Dr.Vaishnav Exh.11

(ii) PW-2 Keshavlal Thakore Exh.17 who prepared the sketch.

(iii) PW-3 Naviben Karamsibhai Exh.20 sister of the deceased and informant.

(iv) PW-4 Chhaganbhai Merabhai Harijan Exh.23 panch witness who turned hostile.

(v) PW-5 Arjan Karamsibhai Exh.28 brother of the deceased and eye witness No.2.

(vi) PW-6 Vasudev Aaditram Exh.29 panch witness

(vii) PW-7 Ranjitsing Sardarsing Exh.34 Head Constable, Radhanpur Police Station who recorded the FIR.

(viii) PW-8 Karamsibhai Virabhai Exh.37 father of the deceased and injured eye witness no.3.

(ix) PW-9 PSI Shri Pritvirajsinh Sarvaiya Exh.38 who conducted the investigation.

##. So far as the death of the deceased is concerned, there was no serious dispute before the trial court. Similarly, there was no serious dispute before me when the matter was argued at length by Mr.D.K.Acharya, learned advocate for the appellant. It is in the evidence that the deceased was found in injured condition when he was taken to the hospital. It seems that, the deceased actually died before he could reach the hospital at Radhanpur. He was declared dead at that point of time. Dr.Vaishnav Exh.11 had clearly stated that the deceased had injuries on his front left part of the head and there was linear fracture. The said internal injury was corresponding to the external injury referred as above. The doctor has also produced the post-mortem note Exh.13 wherein it has been clearly stated by the doctor that the deceased had died on account of external haemorrhage followed by the head injury. This clearly indicates and proves that the deceased died a homicidal

death. The trial court has also recorded its finding accordingly and there is no room for doubting the said findings of the trial court.

##. As regard the actual happening, we can find the evidence of the informant - Naviben Karamsibhai - PW-3 at Exh.20. According to her evidence, she had gone with her younger brother for providing food to her brother Ratna and father - Karamsibhai who had gone to graze their cattle. She had deposed that, she reached at the spot at about 1.00 p.m. and she had served the food to the deceased Ratna and father Karamsibhai. That both were sitting under the neem tree by the side of the water tank. That at that time, the present appellant and his two brothers Vashram and Vela arrived their at the spot and asked the deceased to take away the cattle sitting under the said neem tree. The appellant and his brothers wanted their cattle to sit under the said neem tree, and therefore, they wanted to remove the cattle of the deceased from the said place. The deceased replied that, he was taking his food and he would not take away his cattle from the said place. At that time, all the three accused persons started beating the deceased with their sticks. That the appellant dealt a stick blow on the head as well as on the right hand of the deceased. That the deceased tried to run away from the said place, but the appellant and his brothers threw him on the ground. That at that time, the deceased was climbing the slope to reach the top. The witness has further stated that, her father Karamsibhai and brother Arjan also tried to intervene and the accused nos.2 and 3 had dealt stick blows on their persons. That she raised shout, and therefore, the appellant and other accused persons ran away from the said place. She made it clear that, she did not know as to where they run away and whether they took away their sticks with them or not. That thereafter, Chhaganbhai Merabhai, Vasudevbhai and other persons had arrived there.

14.1 The witness has been cross examined at length. Efforts were made to show that the witness was not present when the incident took place. However, on going through the cross examination of the witness, it becomes clear that the witness has stood the test of cross examination and her evidence has not been shaken to any extent.

14.2 Her evidence has been amply corroborating by the FIR which was filed by her at about 7.30 p.m. at Radhanpur Police Station. This shows that the FIR has been filed without any loss of time. It is required to

be considered here that the deceased was first taken to Santalpur for his treatment, but no doctor was available there, and therefore, the deceased was taken to Radhanpur hospital. Therefore, these facts themselves are sufficient to explain some sort of delay which has been caused in filing the FIR. Therefore, it is clear that the FIR has been filed by Naviben sister of the deceased without any loss of time.

14.3 The FIR clearly supports and corroborates the testimony of the informant - Naviben. There is no material contradiction/omission or material improvement in her evidence. The FIR clearly shows that the incident took place as stated by her in her evidence. It also shows that the present appellant had dealt, forcefully, the stick blow on the head of the deceased, and therefore, the deceased had fallen on the ground. She has further stated about the injury caused by two brothers of the appellant to the brother - Arjan and father Karamsibhai.

##. Then we can take the evidence of her brother Arjan at Exh.28. He also stated that, he, in the company of his sister, had gone to provide the food to their brother and father. That both of them were taking their food under the neem tree and cattle were sitting under the tree. That when the father and the brother were taking their food, the appellant in the company of two other accused persons arrived there and they asked the deceased to take away his cattle from the said place. He has further stated that the deceased told the appellant and his brothers that he was taking the food, and therefore, he would take away the cattle after he finished his food. He also told that the neem tree did not belong to them. At that time, according to him, the appellant got angry and started hot exchange of words. That the appellant and the deceased both were moving towards the top of the slope. That thereafter the appellant dealt a stick blow on the head of the deceased, and therefore, the deceased had fallen on the ground. That he, his sister and the father tried to intervene at which the accused No.2 Vashram dealt stick blow on his right thigh and another accused - Vela dealt a stick blow on the left knee of the father. That he and the father both had fallen on the ground on receiving the said injuries.

15.1 The witness has further stated that shouts were raised at which Chhagan Mera Harijan had arrived at the spot, but the appellant and other accused persons had run away from that place. That the injury of the deceased was bleeding. That thereafter, the deceased was taken to

Santalpur hospital in a vehicle, but since the doctor was not present there, the deceased was taken to the Government hospital at Radhanpur where the doctor declared that the deceased had already died. That thereafter sister - Naviben filed the FIR before the police station at Radhanpur.

15.2 The witness is an injured eye witness. His evidence clearly corroborates the oral evidence of his sister - informant Naviben. The witness has been cross examined at length, but nothing fruitful has been derived from the lengthy cross examination. It is true that there are some minor contradictions between his oral evidence and his statement recorded by the police but there is no material improvement noticed in his evidence.

##. The third eye witness is the father - Karamsibhai at Exh.37. He was shown to be 70 years of age. The learned Additional Sessions Judge has recorded that the witness-Karamsibhai was very old and he was found to be physically weak. He was hard of hearing and he found difficulty in understanding the questions put to him. This witness had deposed that he and his son - deceased Ratna were present by the side of neem tree. That his daughter and son - Naviben and Arjan had come to supply food to them. That both of them were taking their food, that at that time the appellant in the company of two other accused persons arrived there. That the accused Vela dealt the stick blow on his person and the appellant Kheta dealt the stick blow on the head of the deceased and killed him. He has also stated that, he has sustained the injury on his left knee which was on account of the stick blow dealt on him by the accused Vela. That thereafter the deceased was taken to the hospital. He stated that, he had not gone to Radhanpur at that time, but he had gone there thereafter.

16.1 The witness has admitted in his cross examination that he was hard of hearing and his vision was also weak. He stated that, he would be able to see an object at the distance of 4 to 5 feet. He also stated that he could go to the upper floor of the court house with difficulty. That he had gone to the water tank at noon hours very slowly.

##. Efforts were made to argue that this witness is a got up eye witness and he had no reason to go to the spot to graze the cattle.

##. It is true that the witness is an aged person. He found difficulty in walking and hearing. His vision is

also weak. Looking to the aforesaid physical condition, it is argued that the witness could not be present at the time of incident.

##. Now it is to be seen that, his presence has been disclosed in the FIR itself lodged by rustic village girl without any loss of time. It is true that, the witness was physically weak and he had all possible difficulties as admitted by him, but nevertheless such an old person sometimes may not find it proper or suitable to remain at home for the whole day. It is, therefore, stated that, he had reached there late in the morning. It may be that the witness may not be regularly going to graze the cattle for the whole day, but he may go for the said work on part time basis for a few hours in a day. That may also not be very regular. It would depend upon the physical condition and health of the witness. In that view of the matter, simply because the witness is an aged person and simply because he has physical difficulties, it cannot be said that the witness was not present at the spot and had been got up as eye witness. He could have narrated the entire story in details as has been deposed by his son and daughter. His evidence has very limited facts. He has not described the entire episode in detail. This clearly shows that the witness cannot be treated to be a got up one and his presence at the scene of the offence, therefore, cannot be questioned.

##. When the brother and sister both were eye witnesses and when other witnesses were also examined, it was not necessary for the prosecution to introduce this witness as false and fabricated witness. His version appears to be natural and did support and corroborate to the evidence of his son and daughter to some extent. At the same time, evidence of the son and daughter also corroborates the oral testimony of this witness.

##. It is required to be considered here that, even his evidence has been corroborated by the medical evidence. The witness was examined on 11.5.1990 at Public Health Center at Radhanpur by Dr.Vaishnav at Exh.11 who has clearly deposed that, he had examined the person of the present witness - Karamsibhai and he had noticed that the witness had following injuries on his person:

(i) Abrasion on left elbow

(ii) Contusion on left knee lat.side.

According to the evidence of this medical officer, these two injuries could be caused by a hard and blunt

substance and could be cured within 8 to 10 days if no complication occurres. The oral evidence of this witness got corroboration from the certificate issued and produced by him during his evidence.

##. Even the evidence of Arjan has been corroborated by the medical certificate since the doctor has stated that he had examined Arjan and he found abrasion on left side of thigh which could be caused by a hard and blunt susbtance. This shows that the oral evidence of these two injured eye witnesses has been fully supported and corroborated by the independent medical evidence in the shape of oral evidence of Dr.Vaishnav at Exh.11 and his certificates at Exh.15 and 16.

##. Then the evidence of these three witnesses got full corroboration from the oral evidence of Dr.Vaishnav with respect to the injuries on the person of the deceased. Dr.Vaishnav has clearly described the injuries sustained by the deceased while giving oral testimony at Exh.11 which is supported by the post-mortem note Exh.13.

##. So oral evidence of the brother, sister and father of the deceased supports one another and their evidence is supported by the medical evidence in the form of oral testimony of Dr.Vaishnav, post-mortem note and injury certificates.

##. The learned advocate for the appellant had argued at length that there is a slope of nearly 60 ft. and the blood has been found almost at the top of the said slope which is at the distance of 57 ft. from the neem tree under which the deceased is alleged to have been sitting at the time of incident. Mr.Acharya argued that the deceased could not have climbed the distance of 57 ft. after receiving injuries in question. It is also argued that, nobody was present on the spot. That the deceased was killed by some stranger. That the witnesses came to know about the murder of the deceased. That, therefore, false FIR has been filed against the appellant and two other accused persons.

##. Above argument advanced by Mr.Acharya, learned advocate for the appellant did not convince me. It is true that there is a distance of 57 ft. from the neem tree to the place at which the blood was found. Here, we have to consider some important aspects which are brought on record through the evidence of the prosecution. It is undoubtedly true that the distance between the neem tree and the place where the blood was found was 57 ft. and that the said place is almost at the top of the slope.

Therefore, one would be required to climb the distance of 57 ft. for going from the neem tree to the place where the blood was found.

##. At the same time, it is required to be considered here that the distance has been measured from the stem of the tree. It is not the case of the prosecution witnesses that the deceased was sitting under the tree touching the stem of the tree itself. It is stated that the deceased was taking his food with his father under the tree. It does not necessarily mean that they were sitting at the bottom of the tree touching the stem of the tree. They may be sitting little away from the stem of the tree and their cattle were also sitting right under the tree. Therefore, some distance will have to be deducted from the said distance of 57 ft. while considering the above aspect of the case.

##. Then, we may consider the evidence of Naviben at Exh.20, who is an informant also. She has deposed that at the time of incident, the deceased was trying to run away from the spot towards the top of the slope. That means that the incident did not take place right under the tree. Similarly, the evidence of her brother - Arjan also shows that the deceased was running towards the top of the slope. Even in her cross examination, the informant has clearly stated that the deceased had run from the said spot and thereafter he fell on the ground. That thereafter, he received another stick blow at the hands of the appellant. This omission in the FIR was brought to her notice. She stated that, she did not remember if she had stated in the FIR that the deceased had tried to run from the spot. There cannot be any dispute about the same and the fact that the deceased had tried to run from the said spot does not appear to have been stated in the FIR. At the same time, we have to consider the natural conduct of the parties at the time of such an episode. When three persons were about to attack the deceased, it was quite natural and probable that the deceased would have tried to run from the spot in order to try to save his soul. Therefore, the fact that the deceased tried to run from the spot is quite natural conduct of the deceased, and therefore, even if there is a minor omission, it cannot be said that the witness Naviben had improved her story on material particulars, and therefore, it should not be accepted.

##. It is a case of the prosecution from the beginning that the deceased and the father both were taking their food under the tree and the blood has been found at the distance of 57 ft. which indicates that the deceased

must have tried to run from the spot in order to save his soul. Even the evidence of Naviben has been supported by the evidence of her brother who also appears to have omitted to state that fact in his police statement, but as stated above, it appears to be a natural conduct on the part of the deceased to try to run away from the spot.

##. Now at the bottom, there was water in the water tank. The appellant and his brothers had come to the spot from that side. Therefore, it is quite natural that the deceased would try to run away in a different direction, and therefore, the deceased must have run towards the top of the slope. Even otherwise, the blood has been found near the top of the slope which clearly supports the testimony of the informant and the testimony of her brother.

##. Mr.Acharya has argued that, it would not be possible for the deceased to climb the distance of 57 ft. after receiving injury on his head. There is no medical evidence on this aspect of the case. No opinion has been sought from Dr.Vaishnav on the point by asking a question to him that it would not be possible for the deceased to climb the distance of 57 ft. after receiving injury in question.

##. Even otherwise, as stated above, the measurement has been taken from the bottom of the stem of the tree. The deceased and the father were not sitting touching the stem. There would be some distance between the sten and the place where they were sitting for taking food. Then the deceased got up when the appellant and his brothers asked him to take away the cattle. In the process, he must have crossed some distance and after climbing some distance, he seems to have fallen on the ground. There is no evidence on record to show that the slope at the place is extremely stip, and therefore, it was not possible to climb the said slope on the upper side. Even otherwise, the blood has been found right near the top of the slope which clearly indicates that the deceased had fallen there after receiving the injury. This would further prove tht the deceased was able to climb that distance towards the upper side of the slope. The deceased was quite young. He was a rustic villager going out for grazing the cattle. To climb hills and slopes may be his routine also. Therefore, nothing unnatural has been found in the evidence given by the father, daughter and son as stated hereinabove.

##. The trial court has given due weightage to all the

circumstances for and against the prosecution and thereafter the trial court has properly appreciated the evidence of all these three witnesses and has found that the episode as described by the witnesses is real, true and genuine.

##. The prosecution has also examined the Revenue Circle Inspector at Exh.17 who has given detail as to the place of incident.

##. Then there is evidence of Chhaganbhai Merabhai Exh.23 who has been declared hostile by the prosecution. In fact, he had reached the spot on hearing the shout raised by the informant, but the witness has not supported the prosecution story, and therefore, he has been treated hostile by the prosecution.

##. Then we can find the evidence of Vasudev Aaditram at Exh.29. He is a panch witness and according to his evidence, the place of offence was shown to him and blood stain earth was collected and sealed with the seal of the police and the panchnama was drawn which was produced by him at Exh.31. According to his evidence, the appellant was present at the police station and he had stick with him. He has also stated that, he had produced the said stick before the police and it was attached by the police under a panchnama which has been produced by him.

##. The clothes of the appellant were found stained with blood, but it is argued that, no question has been put to the appellant about this evidence of this witness, and therefore, when the appellant did not get an opportunity to explain this evidence against him during the further statement under section 313 of the Code of Criminal Procedure, 1973, this piece of evidence should have been excluded from the consideration.

##. It is true that the learned Additional Sessions Judge does not appear to have put any question with respect to this evidence to the appellant in order to seek his explanation about this evidence appearing against him while recording further statement under section 313 of the Code. Therefore, ordinarily, the evidence of this witness on this point should not be taken into account for any purpose against the appellant. At the same time, this has not caused any prejudice to the defence of the appellant and the appellant was defended by a senior advocate before the trial court. Therefore, even if the evidence of this witness was considered by the trial court, no prejudice has been caused to him, and therefore, this fact cannot go against

the prosecution case. It must be observed here that the advocate for the defence should also draw the attention of the Judge if a particular question is ommitted when the examination of the accused takes place under section 313 of the Criminal Procedure Code. As an officer of the court, he could suggest that a question of a particular nature be put to the accused.

##. Let us exclude this evidence of this witness from consideration. Then also the fact remains that the evidence of three eye witnesses is already there on the record and it has been fully supported by the medical evidence. Out of three eye witnesses, two eye witnesses are injured. As stated above, their evidence appears to be quite genuine and natural. Their presence is also proved to be natural on the spot. After all, these witnesses are rustic villagers who have their own way of conveying the things seen by them. They do not appear to be well educated, and therefore, while weighing their evidence, this aspect cannot be omitted from consideration. Viewing the matter from this angle, it is very clear that the prosecution case is fully supported by the three eye witnesses and the evidence of these witnesses has further been supported by the evidence of the medical officer and post-mortem note coupled with the injury certificates.

##. Even the panchnama with respect to the scene of the offence also supports the evidence of these witnesses. There we find that, the foot marks of the cattle were found around the said tree, blood was found at the top of the slope. These are the circumstances which corroborate the oral evidence of the aforesaid three witnesses.

##. As stated above, there is nothing on record to show that the slope is so stip that one cannot climb at the top where the blood was found which indicates that the deceased had fallen on the ground at that place which clearly indicates that the deceased was able to climb the said slope which would further go to show that the slope could not extremely stip.

##. All these aspects have been properly considered by the learned Additional Sessions Judge while appreciating the evidence of the witnesses. Due weightage has been given to the evidence given by the father having background of his physical condition. In that view of the matter, it will not be possible to find out that any error has been committed by the learned Additional Sessions Judge in the matter of appreciation of the evidence of the witnesses. It is required to be

considered here that even the question of intention of the present appellant has been taken into account and it has been found that there was no such intention on the part of the appellant to commit the murder of the deceased. The State has not filed the appeal against the acquittal of the appellant from the offence punishable under section 302 of IPC.

##. The trial court has found that the appellant had knowledge and only the knowledge could be attributed to him. Therefore, the learned trial judge has convicted the appellant not for the offence punishable under section 302 of IPC, but for the offence punishable under section 304 Part II of IPC. Even the quantum of sentence is not found to be very harsh looking to the nature of the offence proved to have been committed by the appellant.

##. As stated above, the FIR cannot be omitted from the consideration on the ground that it was filed at a great delay. The delay has been properly explained. The place of offence is at the distance from Santalpur where the deceased was first taken. The doctor was not available, and therefore, the deceased was taken to Radhanpur hospital and the FIR was filed at Radhanpur. Considering the said distance from the place of the offence to Radhanpur via Santalpur, it cannot be said that, there was a delay in filing the FIR. The FIR has been filed by the eye witness who is a rustic woman of a distant village. It seems that, in fact, there was no even time at her disposal to fabricate the story against the appellant. There is nothing on record to show that the deceased or three eye witnesses had some axe to grind against the appellant and his brother. Therefore, it is not acceptable that the names of the appellant and his brothers have been falsely implicated in the FIR.

##. It is required to be considered here that, if the witnesses were not the witnesses to the incident and if they simply saw the deceased in an injured condition at the top of the slope in question as suggested by the learned advocate for the appellant, then they would not be knowing as to what is the nature of the injury, what is the weapon used and how many persons had caused this injury. The fact that the witnesses have clearly stated that the appellant and two other accused persons had sticks with them at the time of incident and that they dealt the stick blow on the deceased, brother and the father which clearly shows that the evidence is true and genuine. That the said evidence is supported by the medical evidence which shows that the injury could be

caused by imposing of stick blow.

##. Suffice it to say that there is sufficient evidence and material on record to hold that the present appellant had dealt the stick blow on the head of the deceased and the learned Additional Sessions Judge has rightly attributed the knowledge to the appellant and has rightly convicted him for the offence punishable under section 304, Part II of IPC.

##. In the facts and circumstances of the case, I find that the learned Additional Sessions Judge has given cogent reasons for accepting the evidence of the three eye witnesses supported by the medical evidence and the evidence of the panch witnesses. No error is shown to have been committed by him in the matter of appreciation of the evidence. There is no reason to differ from the view taken by the learned Additional Sessions Judge in convicting the present appellant. We are not here to discuss the conviction of two other brothers of the appellant since they have accepted and acquiescened their convictions and sentence and have served out the punishment imposed upon them as since they are not before this court as they have not preferred criminal appeal against their conviction and sentence. I do not consider this omission on the part of these brothers to be a plus point for the prosecution. The omission to challenge this conviction has totally been omitted from my consideration. In that view of the matter, there seems to be no merit in the present appeal and consequently it deserves to be dismissed.

##. For the foregoing reasons, this appeal is ordered to be dismissed. The judgment and conviction order of the Additional Sessions Judge are hereby confirmed. The appellant is on bail, and therefore, he is directed to surrender immediately. However, the appellant does not surrender within a period of six weeks from today, non-bailable warrant shall be issued against him for his arrest in order to see that he may serve out remaining sentence. In that event, intimation shall be immediately given to the surety informing him about the order of this Court so that he can take appropriate step for the surrender of the appellant in time.

(D.P.Buch,J)
(pathan)